

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDY O'DANIEL

Claimant

VS.

AMAZON.COM

Respondent

AND

LUMBERMEN'S MUTUAL CASUALTY

Insurance Carrier

Docket No. 268,222

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's November 13, 2002, Award. On February 4, 2003, this case was placed on the summary docket for decision without oral argument.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Vincent A. Burnett of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant alleged injury to her left wrist and right hip. The Administrative Law Judge (ALJ) limited the award to a 5 percent scheduled injury to the left forearm.

The claimant contends the ALJ erred in limiting the award to a scheduled disability. Claimant contends the work accident injured not only her left wrist but also her right hip. Claimant argues that because she limited the use of her left side, she developed right hip problems. Claimant argues she is entitled to a whole body functional impairment because Dr. Edward J. Prostic provided an impairment rating for her right hip. Claimant also argues

that from July 20, 2001, to September 14, 2001, she is entitled to temporary total disability compensation.

The respondent agrees that on September 12, 2000, claimant injured her left wrist. On September 14, 2001, she was released from further medical treatment. But respondent notes that claimant never complained of right hip pain to any doctor during the year she was receiving treatment for her left wrist. Respondent argues the claimant's failure to make contemporaneous right hip complaints establishes the accident only injured the claimant's left wrist. And respondent argues it is not consistent that a right hip injury would result from favoring the left wrist. Consequently, respondent requests the ALJ's Award be affirmed.

The issues before the Board are the nature and extent of disability and whether claimant is entitled to temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board concludes that the ALJ's Award should be affirmed.

Claimant worked in respondent's warehouse facility. She stood at a table and packed products into boxes for shipping to customers. On September 12, 2000, she was packing books into a shipping box. The box broke and over 30 pounds of books fell pinning her left wrist to the table.

Respondent referred claimant for treatment. She began treatment with Dr. Paul Sandhu. Dr. Sandhu performed a nerve conduction study. He concluded claimant might have mild carpal tunnel syndrome and prescribed medication. Claimant was then treated by the company physician, Dr. Adnan Khan. Dr. Khan diagnosed tendonitis in claimant's left wrist. Dr. Khan provided a splint, steroid injections, medication and physical therapy.

Claimant alleges that in November or December, because she was limiting the use of her left side, she developed right hip problems. She testified she informed her supervisor of her right hip problems. She testified she also advised Dr. Khan but he said it wasn't related to her wrist.

Respondent also referred claimant to Dr. V.C. Patel, an orthopedic surgeon. Dr. Patel diagnosed de Quervain's tendonitis in claimant's left wrist. A steroid injection was given to the first extensor compartment.

Claimant, on her own, obtained a second opinion on March 7, 2001, from Dr. James Queenan, an orthopedic surgeon. Dr. Queenan also diagnosed de Quervain's tendonitis and recommended a similar course of treatment as Dr. Patel.

On March 8, 2001, claimant signed a letter resigning from employment. But claimant asserted she was terminated and only signed the resignation letter in order to receive her severance pay. Claimant received unemployment benefits from the end of March through the end of September 2001.

On June 15, 2001, the respondent transferred claimant to Dr. Mark Melhorn for further treatment. After additional conservative treatment did not improve claimant's left wrist complaints, on July 20, 2001, Dr. Melhorn performed a surgical left de Quervain's release and excised a mass on claimant's left wrist. After post-surgery physical therapy, claimant was released on September 14, 2001, without restrictions. Dr. Melhorn, based upon the *AMA Guides*¹, opined claimant suffered a 3.1 percent permanent partial impairment to the left forearm. Dr. Melhorn agreed that the *AMA Guides* would allow his rating to be rounded up to 5 percent.

Claimant was examined by Dr. Edward Prostic on November 27, 2001, at her attorney's request. Dr. Prostic noted claimant had a reasonably good result from her de Quervain's operation but had some continuing evidence of tendonitis as well as tenosynovitis of her thumb and evidence of mild median and ulnar nerve entrapment. And she had evidence of trochanteric bursitis at her hip. Dr. Prostic, based upon the *AMA Guides*², assigned a 12 percent rating for the left upper extremity and a 2 percent rating for the hip. These ratings combined for a 9 percent whole body functional impairment.

Claimant argues that from July 20, 2001 to September 14, 2001, she is entitled to temporary total disability compensation. This time period starts the date surgery was performed and continues through the date Dr. Melhorn released claimant from treatment. She was released without restrictions. Claimant agrees that from the end of March 2001 through the end of September 2001 she collected unemployment benefits. And while collecting unemployment benefits claimant further agreed she applied for at least two jobs a week alleging she was able to work.

K.S.A. 44-510c(b)(2) provides:

Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.)

² *Id.*

disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant, in her brief to the Board, argues the fact she was on unemployment is irrelevant and that Dr. Melhorn indicated that she was on light duty after her surgery. A review of Dr. Melhorn's records indicates that claimant requested she be released to work the day after surgery.³ Dr. Melhorn indicated that after surgery he imposed restrictions consisting of light-duty work increasing to light-medium work and culminating in regular work activities. Nonetheless, there were no work release slips in the record. And the fact that claimant was released with restrictions does not automatically establish she was or was not capable of engaging in substantial gainful employment.⁴

While receiving unemployment benefits claimant applied for employment and represented that she was ready, willing and able to work. She had been released to work with restrictions but not taken off work. The Board concludes claimant has not met her burden of proof to establish entitlement to temporary total disability compensation.

The next issue for Board determination is whether claimant is limited to a scheduled disability to the forearm or whether she is entitled to compensation for a whole body impairment. Claimant argues her testimony is uncontroverted that as a result of favoring her left arm she injured her right hip. While the trier of fact cannot arbitrarily or capriciously refuse to consider the testimony of any witness, it is not obliged to accept and give effect to any evidence which in its honest opinion is unreliable, even if such evidence is uncontradicted.⁵

Claimant's testimony is inconsistent with and is contradicted by the histories contained in the various medical records. And her allegations are not otherwise supported by the record. During the year time span that claimant received treatment for her left wrist, the medical records do not contain any mention of hip pain. On at least three separate visits to Dr. Melhorn the claimant was provided a sheet containing an outline of the human body as well as the hand. Claimant was instructed to draw on the diagrams where she was experiencing pain. The drawings all indicated her complaints were limited to her left wrist.⁶

³ Melhorn Depo., Ex. 2.

⁴ *Griffin v. Dodge City Cooperative Exchange*, 23 Kan. App. 2d 139, 927 P.2d 958 rev. denied 261 Kan. 1084 (1997).

⁵ *Collins v. Merrick*, 202 Kan. 276, 448 P.2d 1 (1968).

⁶ Prostic Depo., Ex. 2.

Moreover, when claimant sought an independent medical opinion from Dr. Queenan, she agreed that she never complained of hip pain.

Dr. Prostic agreed that favoring the left wrist, as a cause for complaints of overuse syndrome in the right hip would be unusual. Moreover, Dr. Prostic based his rating to the hip on claimant's subjective complaints because all the objective testing was negative. Although Dr. Prostic rated claimant's hip, he conceded that if hired by respondent and given a history of no hip complaints to the treating physicians, coupled with the unusual mechanism of injury and the absence of objective findings, he would have concluded the hip complaints were not caused by the work-related accident.

The Board agrees with the ALJ's determination that the greater weight of evidence establishes claimant suffered injury to her right forearm but any alleged hip problems are not the result of that injury. The ALJ noted the opinion of the treating physician was more persuasive, but rounded his percentage of impairment up to 5 percent as the doctor indicated was permissible under the *AMA Guides*. The Board agrees and adopts that finding.

AWARD

WHEREFORE, Administrative Law Judge Jon L. Frobish's Award dated November 13, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation